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Supreme Court, U.S.
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No. 03-9877

In The Supreme Court Of The United States

JON B. CUTTER, *et al.*,
Petitioners,

v.

REGINALD WILKINSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

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INTRODUCTION

Respondents, Ohio prison officials ("Ohio"), agree with the Petitioner that the Court should grant certiorari here, so that the Court may review whether the prison-specific provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) violate the Establishment Clause. The circuits are squarely split on the question presented, and as the United States has noted in a similar pending case, the "conflict is mature and entrenched," and "[p]ostponing review is not likely to contribute to the reasoned resolution of the question presented." See Brief for the United States in *Bass v. Madison*, Case No. 03-1404 (petition pending). Indeed, just as Respondent Ohio acquiesces here, both of the *Bass* Respondents—the United States and the private plaintiff there—have likewise acquiesced in *Bass*. In sum, all of RLUIPA's defenders and antagonists, whether public or private, whether winners or losers below, are all of one voice on the need for some review in some case, and Ohio joins that chorus.

Because the case for review has been strongly made by others in this case and in *Bass*, Ohio's response here focuses on what it considers to be the real questions raised by this Petition: (1) should the Court grant certiorari in *this* case, even if it grants review in *Bass*, and (2) should the Court also review the parties' disagreement over several federalism issues concerning RLUIPA, such as Congress's power to enact RLUIPA under its Commerce Clause or Spending Clause powers, and whether RLUIPA violates the States' sovereignty and immunities under the Tenth and Eleventh Amendments? Ohio submits that the answer to each question, even considered separately, is yes. Considering them together, however, even more strongly demonstrates the need for broader review and the need to include this case in that review.

This case is a necessary vehicle for properly resolving any of the constitutional questions surrounding RLUIPA, even just the Establishment Clause question. That is because, as

explained below, the State of Virginia in *Bass* has adopted a theory of the Establishment Clause—a hybrid of federalist theory and Establishment Clause concepts—that differs from the traditional Establishment Clause position advanced by Ohio and adopted by the Sixth Circuit. Ohio suggests that the Court's full consideration of the Establishment Clause question is best served if both views are fully pressed by parties, and indeed, Ohio would advance both views if this Petition is granted. But while Ohio does not disagree with Virginia's view, Virginia expressly disclaims Ohio's position. Thus, if the Court grants certiorari in *Bass* only, it would cut off representation of the only view that has been adopted by any circuit court in striking RLUIPA. That seems a less-than-optimal approach to resolving the circuit split, given that the decision below, operating on Ohio's theory, is what drives the need for review to begin with.

Further, the Court should review not only the Establishment Clause issue(s), but it should also address whether RLUIPA is a valid exercise of Congress's powers under the Commerce and Spending Clauses and whether RLUIPA violates the Tenth and Eleventh Amendments. This is true for several independent reasons. One is that the law governing prisoners' Free Exercise claims has zigzagged over the years, even more so than in most areas of changing law, as Congress and the Court have now responded to each other several times in adjusting the standard of review that applies to such claims. Another is that the Court should avoid the very real possibility that, as explained below, piecemeal review of this statute could result in a situation in which the law is upheld and remains on the books, even if a majority of the Court—albeit on different grounds in different cases—finds the law unconstitutional.

If the Court agrees that full review is needed, so that the Court can address all of the constitutional clouds swirling around RLUIPA, then it surely should review this case, as *only* this case allows the Court to properly reach all of the federalism issues (under the Commerce and

Spending Clauses, and Tenth and Eleventh Amendments) regarding RLUIPA's (un)constitutionality. Because the Sixth Circuit struck RLUIPA in this case, Ohio, as Respondent, should be allowed to raise the federalism issues as valid alternate grounds for affirmance. By contrast, the State of Virginia is a Petitioner in *Bass*, and it seeks to raise those and other issues as alternate grounds for *reversal*. While Ohio supports Virginia's effort to have the entire law reviewed, it urges that only this case provides a proper vehicle to do so. Indeed, the United States agrees with us on that score, as it expressly acknowledged in its *Bass* acquiescence that only this case would properly raise the additional issues. We differ, though, with the federal government on this: what the United States sees as vice, we urge as virtue. They urge the Court to deny review here precisely to avoid the federalism issues, but again, such avoidance is ill-advised.

In sum, the Court ought to fully address the constitutional challenges to RLUIPA, and only this case allows it to do so. This Petition should be granted.

JURISDICTION

The district court actions giving rise to this petition were brought under 42 U.S.C. § 2000cc-1, so the district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court order at issue was entered on February 26, 2002, and the defendants below, the Respondents here, filed their notices of appeal in all three cases on March 1, 2002.

The court of appeals had jurisdiction on two separate grounds. First, the Defendants, all State officials, initially appealed (on March 1, 2002, as just noted) the denial of their claim of sovereign immunity. That provided appellate jurisdiction under the collateral order doctrine. In addition, the district court later certified the issues presented here for interlocutory review under 28 U.S.C. § 1292(b). As the Petition notes, it did so on August 4, 2003. The Respondents then timely petitioned the court of appeals to accept that alternate jurisdictional basis, and that petition was granted.

A panel of the U.S. Court of Appeals for the Sixth Circuit declared RLUIPA unconstitutional on November 7, 2003. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), Pet. App. A. The prisoner-plaintiffs, who are now Petitioners here, sought rehearing, as did the United States. Rehearing was denied on March 7, 2004.

Petitioners filed for certiorari on April 19, 2004, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises from three separate Free Exercise cases, brought by inmates professing several different religions. In one case, Petitioner Cutter professes to adhere to Satanism, and Petitioner Hampton is a Wiccan witch. In another, Petitioner Gerhardt professes the white-supremacist beliefs of the Church of Jesus Christ Christian. The third case was brought by a class of inmates, led by Petitioners Miller and Blankenship, all of whom claim to practice Odinism/Asatru, which is based on the Norse/Viking polytheistic tradition. In each case, the plaintiff(s) contested security measures that they claimed burdened their religious practices in violation of RLUIPA's prison provisions. Their cases were consolidated for the purpose of determining that statute's constitutionality. *Gerhardt v. Lazaroff*, 221 F. Supp.2d 827 (S.D. Ohio 2002) (district court opinion, incorporating Magistrate's Report and Recommendation) (also reproduced as Pet. App. B).

The defendant prison officials ("Ohio"), Respondents here, argued that RLUIPA violates the Establishment Clause because Congress's choice to significantly elevate religious prisoners' rights over those of their secular peers sends an unmistakable message of government endorsement of religion. Further, Ohio urged that RLUIPA's least-restrictive-means test imposes unconstitutional burdens on third parties, in violation of the principles recognized in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Ohio also argued that RLUIPA's requirements were insufficiently related to any federal funds sent to Ohio's prisons, thus undercutting any reliance on the Spending Clause as a basis to impose RLUIPA here, or as a basis for overriding our Eleventh Amendment immunity from federal damages suits. Ohio also urged that the religious burdens did not have a sufficient impact on interstate commerce to justify application of the Act, and that even if such commercial effects were present, the means that

Congress chose to regulate those matters crossed the limits set by the Tenth Amendment. Ohio also argued that we were protected from suit by sovereign immunity, because the *Ex parte Young* fiction could not apply if RLUIPA was itself unconstitutional. That is, without a valid RLUIPA, there would be no underlying violation of federal law to separate state employees from their employer's sovereign immunity. Also, Ohio argued that our Eleventh Amendment was not waived by our purported acceptance of "related" federal funds under the Spending Clause, and of course the Commerce Clause provides no basis for overriding the Eleventh Amendment.

Ohio submitted a large body of evidence to support all of its arguments. Ohio produced affidavit and deposition testimony demonstrating the practical effect of the RFRA/RLUIPA standard on our prisons, including the ways it has motivated inmates to adopt religious postures to circumvent anti-gang measures, the resulting degradations of security, and the significant logistical problems that result when prison officials must evaluate myriad operational practices under a least-restrictive-means standard. Ohio also produced evidence of similar effects in other States' prison systems, including the results of a national survey on the topic.

Neither the prisoner-plaintiffs nor the United States, which intervened to defend RLUIPA's constitutionality, objected to or otherwise contested this evidence. Instead, they submitted their own evidence on other points, and stipulated on yet other points. And of course, they submitted arguments about the legal consequences of that evidence.

The District Court, adopting the Magistrate's Report and Recommendation, rejected the Establishment and Spending Clause challenges, along with the Tenth and Eleventh Amendment challenges. See *Gerhardt*, 221 F. Supp. 2d at 831-32, Pet. App. B at 4. The District Court found it unnecessary to reach the Commerce Clause issue. *Id.* at 832, Pet. App. B at 4.

The Ohio Defendants took a timely interlocutory appeal based on their sovereign immunity theory, which had the effect of bringing RLUIPA's substantive validity before the court of appeals through the collateral order doctrine. That jurisdictional basis was bolstered by the district court's certification of an interlocutory appeal under 28 U.S.C. § 1292 and the Sixth Circuit's acceptance of that certification. *Cutter*, 349 F.3d at 261, Pet. App. A at 3.

The Sixth Circuit held that RLUIPA violates the Establishment Clause because it has the effect of sending a message of government endorsement of religion. *Id.* at 264-68, Pet. App. A at 5-8. The court explained two bases for that holding. First, RLUIPA dramatically enhanced the rights of religious inmates relative to their identically-situated secular peers, allowing inmates who advance religion-based claims much greater chances of successfully compelling changes to institutional practices. *Id.* at 265-66, Pet. App. A at 6-7. Second, the extent of that preference encouraged inmates to become religious, or to pretend to, in order to enjoy those advantages. *Id.* at 266-67, Pet. App. A at 7.

The Sixth Circuit also held that RLUIPA's elevation of religious prisoners' rights was not a permissible burden-lifting accommodation under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). That conclusion also had two bases. First, unlike the measure considered in *Amos*, RLUIPA was not necessary to avoid probable First Amendment violations. *Cutter*, 349 F.3d at 267, 268, Pet. App. A at 7, 8. Second, RLUIPA does not merely restore inmates to the status they enjoyed before the imposition of a governmental burden on religious exercise—which had been the effect of the law at issue in *Amos*—but instead, RLUIPA significantly increased inmates' rights beyond that baseline. *Id.*

The Petitioners and the United States each sought rehearing. The Sixth Circuit denied rehearing, and the private Petitioners filed the Petition.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari here to properly resolve the circuit split regarding RLUIPA's validity under the Establishment Clause.

Although the Ohio Respondents disagree with the Petitioners' ultimate merits analysis, we do agree on the two points relevant at this stage: that the Court should resolve the circuit split regarding RLUIPA's validity under the Establishment Clause, and that this case is a good vehicle to do so.

A. The Establishment Clause question is ripe for review.

All of the parties involved, in both this case and in *Bass*, agree that the Establishment Clause question, on which the circuits are split, is an issue that is ripe for the Court's review. See generally Petition; see also Petition (of Virginia) in *Bass v. Madison*, Case No. 03-1404 (petition pending); (Private) Respondent's Brief in Response in *Bass*; Brief for the United States ("U.S. *Bass* Br.") in *Bass*. As the United States summarized it, the "conflict is mature and entrenched," and "[p]ostponing review is not likely to contribute to the reasoned resolution of the question presented." See U.S. *Bass* Br. at 8.

Because those parties have explained the split, Ohio will not explain it at length again. The Sixth Circuit, in the decision below, held that RLUIPA's prison provisions violate the Establishment Clause, while the Fourth, Seventh and Ninth Circuits have rejected Establishment Clause challenges. *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), cert. petition pending as *Bass v. Madison*, Case No. 03-1404; *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003). And as both the Petition here and the decision below have noted, the split may be considered as even broader, as three other circuits—the Fifth, Eighth, and D.C. Circuits—have rejected similar Establishment Clause challenges to RLUIPA's predecessor statute, the Religious Freedom Restoration Act

(RFRA). See Petition at 7-8; *Cutter*, 349 F.3d at 261-62, Pet. App. A at 4 (explaining split); see *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507 (1998); *In re Young*, 141 F.3d 854, 863 (8th Cir. 1998); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996).

Moreover, the split is universally understood as a legal one, not a factual one, and the split is over both the conclusion regarding RLUIPA, and over several key legal principles. The Sixth Circuit found that RLUIPA has the forbidden effect of advancing religion, violating the second prong of the "*Lemon* test" established by *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Sixth Circuit explained, RLUIPA gives religious inmates an enhanced position relative to secular inmates who file otherwise-identical claims. *Cutter*, 349 F.3d at 266-67, Pet. App. A at 6. In *Boerne*, Justice Stevens had the same objection to RFRA. *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (Stevens, J., concurring) ("the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain."). But the other circuits have all expressly rejected this point about RLUIPA and *Lemon's* "effects" prong. See, *e.g.*, *Madison*, 355 F.3d at 318-319; *Mayweathers*, 314 F.3d at 1069.

Further, the Sixth and the other Circuits have also disagreed on whether RLUIPA is a permissible burden-lifting accommodation under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The Sixth Circuit reasoned that the statute upheld in *Amos*—one that grants religious groups an exception from Title VII's prohibition against religious discrimination—simply "lifted" a burden that the rest of Title VII would have otherwise imposed, leaving religious groups unaffected overall. *Cutter*, 349 F.3d at 267, 268, Pet. App. A at 7, 8. By contrast, RLUIPA went further, "by giving religious prisoners a preferred status in the prison community." *Cutter*, 349 F.3d at 267, Pet. App. at 7. But the other circuits have

expressly found that RLUIPA is the type of "burden-lifting" law that is allowed under *Amos*. See *Madison*, 355 F.3d at 317; *Charles*, 348 F.3d at 610; *Mayweathers*, 314 F.3d at 1068.

In sum, the Court should decide whether RLUIPA violates the Establishment Clause.

B. This case is needed to ensure full review of the Establishment Clause issue.

If the Court decides to review this important issue—as it should—then it should grant certiorari in *this* case to do so. Review in *Bass* alone would not be enough, for at least two reasons. First, Virginia expressly disclaims the Establishment Clause theory adopted by the Sixth Circuit and by the District Court in *Bass*. See Virginia's Petition in *Bass* ("Va. *Bass* Pet.") at 10-11; *Cutter*, 349 F.3d at 264-69, Pet. App. A at 5-8; *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003). Thus, Ohio is needed to fully represent the view that has created the split. Second, the record developed here is far more extensive than that in *Bass*, and that record illustrates the real-world effects of RLUIPA.

First, Virginia has explained that it does not intend to advance the view adopted by the Sixth Circuit, as it instead promotes a different Establishment Clause argument. See Va. *Bass* Pet. at 10-11 (rejecting view); *id.* at 11-15 (explaining federalist Establishment theory). Indeed, not only does Virginia plan to avoid advancing the Sixth Circuit's view, but Virginia goes a step further, as it openly criticizes that view as wrong. *Id.* at 10-11. In Virginia's view, RLUIPA does not violate the Establishment Clause under the *Lemon* test or under any variant theory that focuses on whether government (whether state or federal) has impermissibly advanced or endorsed religion. Instead, Virginia promotes a federalist view of the Establishment Clause, under which RLUIPA's substantive standard does not violate the Establishment Clause, but the problem is that *Congress* imposed the RLUIPA standard on the States. *Id.* at 11-15. Under that view, RLUIPA improperly invades the States' "authority to make policy choices in the 'play in

the joints' between what the Establishment Clause prohibits and what the Free Exercise Clause requires." *Id.* at 13, quoting *Locke v. Davey*, 124 S. Ct. 1307, 1307 (2004).[1]

Because Virginia will not provide the Court a full picture of the Establishment Clause issues here, Ohio's presence as a party is needed. That is not to say that Ohio disparages Virginia's federalist view; to the contrary, Ohio would advance it as one alternative here. But by limiting itself to that view and to the *Caldor* argument (see below at 11-12 and at n.1), Virginia will not provide the Court a full representation of one side of the debate. But the Court *should* have such a full representation at hand if it wishes to fully consider the issues here. Virginia suggests that the Sixth Circuit's "theory is available for this Court's consideration" if the Court reviews *Bass*, because the Court can review the decisions of the Sixth Circuit and of the Western District of Virginia. *Id.* at 11. But reading those opinions is not the same as having a party make the case. Indeed, such concerns frequently lead this Court to appoint counsel to represent a position, when a party indicates it will not defend a certain view defending or opposing the judgment below. See, *e.g.*, *Becker v. Montgomery*, 532 U.S. 757, 758 (2001) (noting that counsel "argued the case as amicus curiae in support of the judgment below, by invitation of the court."); *Alabama v. Shelton*, 535 U.S. 654, 656 (2002) (same, but with counsel opposing judgment below).

Here, the Court can avoid the likely need to appoint counsel in *Bass*, as the Court can and should grant review in this case, and Ohio will fill the role of advancing the Sixth Circuit's position against RLUIPA.

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[1] Virginia, like Ohio, also advances the view that RLUIPA violates the Establishment Clause because it requires accommodations that impose burdens on third parties, in violation of *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). Here, both prison officials and other prisoners are burdened when preferences are accorded to certain religious claimants.

Second, this case adds to the debate because it, unlike *Bass*, offers the Court a comprehensive record of the real-world effects of RLUIPA in prisons, such as the burdens that RLUIPA imposes upon prison officials and upon other inmates. The facts regarding burdens upon others is crucial, as both Ohio and Virginia seek to rely on *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), which concerned the effects of such burdens. Unlike *Amos*, which dealt with *lifting* burdens on those who seek religious accommodation, *Caldor* dealt with the problems that arise when an accommodation is achieved at the cost of *imposing* burdens upon others. See *id.* at 708-10. In *Caldor*, a Connecticut statute mandated that private employers could not require any employee to work on the particular day of the week that the employee identified as his Sabbath. *Id.* at 706. The Court found that this scheme violated the Establishment Clause, as it imposed a cost on the employers and on a claimant's fellow employees, who bore the brunt of the accommodation. *Id.* at 708-10.

Similarly, RLUIPA imposes burdens upon prison officials and upon inmates, who must face the security problems that result from RLUIPA's imposition—and the record here documents those problems. Ohio assembled a comprehensive record of how RLUIPA is used, like RFRA was before it, as a cover for advancing gang-related activities. That record includes the results of a national survey of the real-world impact of the RFRA/RLUIPA standard. And the Petitioners here vividly demonstrate how those whose agendas overlap with disruptive gang activity often invoke demands for religious freedom. For example, Plaintiff Gerhardt is a racial separatist, and no one doubts that racial strife is a problem in our prisons.

Indeed, the gang problem is a primary driver, as a practical matter, of the States' opposition to RLUIPA, as we States all see how RLUIPA hamstrings our efforts to combat prison gangs. See, *e.g.*, *Gerhardt*, 221 F. Supp.2d at 832-33 (denial of separate group services

for white supremacist inmates); *Marria v. Broaddus*, 200 F. Supp.2d 280 (S.D.N.Y. 2002) (challenging increased restrictions on inmates belonging to "religious" groups with a history of gang-affiliated violence); *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002) (same).

While the record in this case thoroughly demonstrates the gang problems and other burdens imposed by RLUIPA, the *Bass* record is not nearly as complete. The *Bass* record is limited to a few facts about that particular case, involving one inmate in one prison, who insists on kosher food.

In sum, the Court should grant certiorari in this case, even if it wishes to review only the Establishment Clause question, as only Ohio will fully press the *legal* issues here, and only this case has a *factual* record sufficient to bring those legal issues to life.

II. The Court should review the other constitutional issues regarding RLUIPA's validity, such as challenges under the Spending and Commerce Clauses and the Tenth and Eleventh Amendments.

Ohio acknowledges that the circuits are not split on the federalism issues here, as they are on the Establishment Clause question. Nevertheless, Ohio urges the Court to review these additional issues both because the States need a definitive resolution to this ongoing debate and because piecemeal review could result in a scenario in which the law is upheld even if a majority of the Court concludes that it is unconstitutional. Further, as explained below, only *this* case would allow the Court to legitimately review all of the constitutional issues regarding RLUIPA, as the federalism challenges offer alternate grounds for affirming the Sixth Circuit's decision.

A. The Court should fully resolve RLUIPA's validity now, without allowing uncertainty to continue, and without allowing for inconsistent decisions by the Court.

The Court should resolve all of the questions regarding RLUIPA's constitutionality in one round of review, because deferring the federalism questions creates two independent problems. First, deferral will cause the States to live with years of harmful and unnecessary uncertainty, in an area that has already been marked for years by frequent swings in the law. Second, if the federalism issues are decided later, cut off from the Establishment Clause issues, such a scenario could easily lead to a bizarre result in which RLUIPA could be upheld even if a majority of the Court finds it unconstitutional, albeit on different grounds.

First, while continued uncertainty is often a hallmark of law, the dramatic swings in this particular area are notable. While prison officials must decide questions of religious accommodation every day, they have had to do so in a legal environment that has fluctuated wildly in the last decade. The controlling standard has swung, since 1993, back and forth between deferential rational-basis review, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), to

strict scrutiny and the least-restrictive-means test, "the most demanding test known to constitutional law," *Boerne*, 521 U.S. at 534. Congress passed RFRA in response to the Court's decision in *Employment Div., Dept. of Human Services v. Smith*, 494 U.S. 872 (1990), and after the Court invalidated RFRA in *City of Boerne*, Congress responded with RLUIPA. This legislative-judicial dialogue is, in many senses, a good thing, as each side of the debate represents a different branch doing its legitimate job. But no one can deny that the brunt of these changes in law is borne by the prison system.

This uncertainty costs more in the prison system than it might in other areas. "Running a prison is an inordinately difficult undertaking that requires," among other things, "planning and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Further, hard experience has taught that "[i]t is important to be consistent with the inmates" because "changing the rules constantly will actually precipitate problems." J. Katz, *Tips on Managing Inmates: The Tricks of the Trade*, Corrections Managers' Report, Vol. VII, No. 6 (April/May 2002) 83.

That uncertainty has very real consequences while it continues. Often, operational decisions, many with very high stakes, are driven by those legal standards. For example, States must combat prison gangs, and they try to do so by, among other things, prohibiting certain groups closely connected with gang activity and certain jewelry used as non-verbal identifiers. Such measures have been recognized as both effective and legal under constitutional standards. *Fraise v. Terhune*, 283 F.3d 506, 512-513 (3rd Cir. 2002) (upholding, as against constitutional challenges, ban on violent group); see *Alameen v. Coughlin*, 892 F. Supp. 440, 445-446, 450 (E.D.N.Y. 1995) (discussing compelling interest in ban on certain jewelry, which had been used as gang identifier). But officials cannot be sure whether they can continue to implement measures such as bans on known violent groups or on symbolic jewelry, because the

RFRA RLUIPA standard has forced their abandonment. *Marria v. Broaddus*, 2003 U.S. Dist. Lexis 13329 (S.D.N.Y. July 31, 2003) (invalidating, under RLUIPA, ban on the same violent group whose ban had been constitutionally upheld in *Fraise*); *Alameen*, 892 F. Supp. at 450 (invalidating jewelry ban, under RFRA, because State did not show that ban amounted to the least restrictive means to address compelling interest). Indeed, no one doubts that claims that would surely fail under the constitutional standard might meet more success, whether leading to ultimate victory or at least surviving dismissal to reach discovery, under RLUIPA. See *Murphy v. Missouri Dept. of Corrections*, 2004 U.S. App. Lexis 12239 (June 22, 2004) (affirming summary judgment against prisoner's Free Exercise claim, but reversing and remanding on identical claim under RLUIPA).

The only way to end this uncertainty, other than striking RLUIPA on Establishment Clause grounds (which Ohio of course urges), is for Court to rule on RLUIPA's validity under the Spending and Commerce Clauses and Tenth and Eleventh Amendments, if it determines that the Act satisfies the Establishment Clause. Otherwise, the uncertainty will continue until another case (or this case after remand) comes up from the circuits. "[P]rison officials, on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonell*, 418 U.S. 539, 566 (1974), simply do not have the luxury of waiting that long.

Second, if the Court waits to resolve the federalism issues, it faces the very real possibility that RLUIPA might be upheld even if, in the long run, a majority of the Court finds it unconstitutional. That odd result could occur in this way: If the Court reviews only the Establishment Clause issue now, it might sustain the law by, perhaps, a 6-3 vote. Then, in a few years, the Court might sustain the law against a Spending Clause challenge, again by a 6-3 vote—but with a different three Justices in dissent. At that point, a majority of six Justices will

have found the law unconstitutional, but the law will stand, as it will have separately withstood both challenges.

By contrast, if the Court hears the questions together, then the same voting lineup, if it occurs simultaneously in one case, would result in the law's invalidation. That is how it should be, if that is how the numbers add up. In fact, the Court frequently reaches a judgment for one side or another with no majority decision, with a judgment-based-majority comprised of markedly different opinions. Nothing is unusual about that, but there is something unusual—and, Ohio submits, undesirable—about allowing a different result to obtain because the decisions are split over the years. Many commentators have explained how such a scenario would be an internally irrational result. See, *e.g.*, F. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 814-20 (1982); E. Hartnett, *A Matter Of Judgment, Not A Matter Of Opinion*, 74 N.Y.U.L. Rev. 123, 140-42 (1999).

Indeed, Ohio stresses that it does not seek to "game the system" by combining the issues to more easily allow for an ultimate result in our favor. To the contrary, Ohio suggests that dividing the issues would amount to a breakdown of the system, even if unintended. To be sure, application of this line of reasoning should be limited, or parties could frequently supplement a certworthy issue with a series of tag-along issues. But here, even though the circuit courts have rejected the States' federalism-based challenges to RLUIPA, those challenges are surely substantial ones.

The United States, in its *Bass* acquiescence, offers several reasons why the Court should not consider the federalism issues, but those reasons are unpersuasive. First, the U.S. notes how those issues are not properly raised in *Bass*, U.S. *Bass* Br. at 11-12, but as explained in Part B below, that is not the case here. Second, the U.S. points to the lack of a circuit split on these

issues. *Id.* at 12-13. Ohio suggests, however, that the concerns raised above outweigh the lack of such a split. Third, the U.S. notes that the Court denied cert. in *Alameida v. Mayweathers*, 124 S. Ct. 66 (2003), and it asserts that Virginia "identif[ied] no intervening development that warrants a different outcome" in *Bass*. The intervening development, though, is the circuit split occasioned by this case, and again, that split on the Establishment issue makes it more sensible to now resolve these interrelated questions regarding RLUIPA's constitutionality as a whole.

Finally, the U.S. urges the Court to allow further percolation of the Spending Clause issue in light of the Court's recent decision in *Sabri v. United States*, 124 S. Ct. 1941 (2004), U.S. *Bass* Br. at 13, but as Virginia explained fully in its *Bass* reply brief, *Sabri* is irrelevant. In *Sabri*, a local official convicted of violating a federal bribery statute claimed that the statute was unconstitutional because it did not require proof of a link between the bribe itself and the federal fund received by the local government. Rejecting the official's attempted reliance on Spending Clause doctrine, the Court explained that such doctrine does not apply to direct federal regulation of individual behavior; instead, Spending Clause limits protect against Congress's use of its fiscal power as "a means for bringing federal economic might to bear on a State's own choices of public policy." *Sabri*, 124 S. Ct. at 1947-48.

In sum, the Court should review all of the issues related to RLUIPA's constitutionality—or, more important, RLUIPA's unconstitutionality. And as explained below, the Court should grant review in *this* case to do so.

B. This case is needed to properly reach the other questions about RLUIPA's validity.

If the Court does wish to reach the challenges to RLUIPA beyond the Establishment Clause—and it should, for the reasons above—then it should surely grant review here, as only this case will properly allow such full consideration of the issues.

As the United States explained in its *Bass* acquiescence, the different procedural posture here, relative to *Bass*, means that only this case raises the whole host of RLUIPA issues. U.S. *Bass* Br. at 10 n.8. That is because Ohio won below, so as Respondent here, it may therefore "rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 123, 137 n. 5 (1982). The United States urges that reality as a reason *not* to review the case, as it, not surprisingly given its desired outcome, seeks to avoid review of the federalism challenges to RLUIPA. After all, it has won those fights below, and it has no reason to risk a loss here. But given the practical reasons to hear those issues, as explained in Part A above, it seems hard to deny the need to grant this Petition as a means to do so.

Although Ohio agrees with Virginia that broader review is more appropriate, it reluctantly concludes that the United States has the better of the argument regarding the resulting scope of review, if review is limited to *Bass* alone. As the U.S. explains, the Court rarely, if ever, reviews non-jurisdictional issues that were not resolved below and are not alternate grounds for *affirmance*, as opposed to grounds for *reversal*. That is, the Court's usual practice is to not consider grounds not passed on below to *attack* a judgment, and Ohio understands that an exception is unlikely in *Bass*. But *Cutter* would allow the Court to reach all of these issues and ensure that all issues are resolved, but without departing from its usual practice.[2]

While this difference in posture is the primary—and in our view, sufficient—reason to review this case as a vehicle to examine the federalism issue, other reasons also militate in favor of this Petition as the better vehicle for resolving those issues. For example, just as the record here is more thorough on the Establishment Clause issues, see Part I-B above, so, too, is the

[2] Ohio notes that, while we ask the Court to conduct a broader legal review than that suggested by the Petition, we do not ask the Court to modify the judgment, which found RLUIPA unconstitutional. Thus, Ohio has not filed a cross-petition in this case. See *Blum*, 457 U.S. at 137 n. 5 (Respondents may "rely upon any matter appearing in the record in support of the judgment below.).

record more developed on the Spending and Commerce issues. Ohio submitted reams of evidence regarding every federal penny that goes to Ohio's prisons, and Ohio built a record showing how those funds are not related to the "burdens" on free exercise alleged here. On the other side, Plaintiffs-Petitioners here submitted much evidence purporting to show how Ohio's prisons affect interstate commerce. The *Cutter* Plaintiffs' efforts on the Commerce front stand in marked contrast to the approach taken by Plaintiff-Respondent Madison in *Bass*. That inmate insists that he has never relied on the Commerce Clause as a predicate for his RLUIPA claims, as he has relied solely on the Spending Clause instead. See (Private) Respondent's Brief in Response in *Bass*, Case No. 03-1404, at 9. Thus, along with the different procedural posture, the different records in *Bass* and *Cutter* show that this case is a superior vehicle for deciding the federalism challenges to RLUIPA.

In sum, just as this case adds a necessary dimension to the Court's review of the Establishment Clause question, this case is a truly indispensable part of any possible review of the federalism issues here.

* * *

In the final analysis, the case for reviewing RLUIPA is both clear and compelling. The need to include *Cutter* in that process is also pressing. *Cutter* is the only vehicle that would allow the Court to properly reach beyond the Establishment Clause, as both Ohio and Virginia have urged it to do. But, even if the Court decides to review RLUIPA solely on Establishment Clause grounds, *Cutter* is still a vital part of the puzzle, as only with *Cutter* will the Court be presented with the full Establishment Clause picture.

CONCLUSION

The Court should grant the Petition, and it should affirm the judgment below.

Respectfully submitted,

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